Supreme Court, U.S.
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No. 93-890

In The

Supreme Court of the United States

October Term, 1993

WILLIAM C. McDONNELL, ROBERT J. WARSOCKI, MICHAEL DINEEN, DON E. BRUNKEN and VERNE BEERS,

Plaintiffs/Petitioners,

vs.

THE CITY OF OMAHA, NEBRASKA,

Defendant/Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The respondent believes the questions presented by the petitioners do not accurately reflect the conclusions reached by the Circuit Court. Respondent submits the following questions are presented by this petition for writ of certiorari:

I. DO ADMINISTRATORS OR EXECUTIVES WHO ARE PAID A SET AMOUNT EACH MONTH, REGARDLESS OF THE HOURS THEY WORK, LOSE THEIR STATUS AS SALARIED EMPLOYEES WHO ARE EXEMPT FROM THE OVERTIME REQUIREMENTS OF THE FAIR LABOR STANDARDS ACT SOLELY BECAUSE THEY MUST OFFSET TIME AWAY FROM THE JOB WITH ACCUMULATED LEAVE BENEFITS BUT FACE NO REDUCTION IN COMPENSATION?

II. SHOULD THE PROVISIONS OF THE FAIR LABOR STANDARDS ACT BE INTERPRETED TO RECOGNIZE THE PUBLIC ACCOUNTABILITY CONSIDERATIONS THAT RESTRICT PUBLIC EMPLOYMENT AND TO REACH THE ACT'S INTENT?

III. IS REVIEW ON CERTIORARI APPROPRIATE WHEN PERTINENT REGULATIONS UNDERLYING THE APPEALS COURT DECISION HAVE BEEN ALTERED TO ELIMINATE FUTURE CONTROVERSIES?

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CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

In addition to the constitutional provisions and regulations identified in the petition for writ of certiorari, the respondent believes the following regulation adopted after the date summary judgment was granted must be considered in reviewing the petition for writ of certiorari.

29 C.F.R. section 541.5d (1993).

§ 541.5d *Special provisions applicable to employees of public agencies.*

(a) An employee of a public agency who otherwise meets the requirements of § 541.118 shall not be disqualified from exemption under §§ 541.1, 541.2, or 541.3 on the basis that such employee is paid according to a pay system established by statute, ordinance, or regulation, or by a policy or practice established pursuant to principles of public accountability, under which the employee accrues personal leave and sick leave and which requires the public agency employee's pay to be reduced or such employee to be placed on leave without pay for absences for personal reasons or because of illness or injury of less than one workday when accrued leave is not used by an employee because –

(1) permission for its use has not been sought or has been sought and denied;

(2) accrued leave has been exhausted; or

(3) the employee chooses to use leave without pay.

(b) Deductions from the pay of an employee of a public agency for absences due to a budget-required furlough shall not disqualify

> the employee from being paid 'on a salary basis' except in the workweek in which the furlough occurs and for which the employee's pay is accordingly reduced.

Effective September 18, 1992.

STATEMENT OF THE CASE

The respondent, the City of Omaha, accepts Petitioner's Statement of the Case with the following corrections:

The district court, in its order granting the assistant chiefs summary judgment, incorrectly stated that "The City does not dispute that plaintiffs are subject to a reduction in pay for absences of less than a day." (A.17). However, there was no evidence before the court that the monetary pay of any assistant chief was ever reduced for absences of less than one day or was "subject to" reduction as that term is properly to be construed. The City had expressly denied plaintiffs' allegation that the City's policies violated the FLSA overtime requirements. (JA.5, ¶ 3). The sole evidence before the court was that the assistant chiefs at all pertinent times were paid a set amount and their monetary pay could be reduced only if they had no accumulated leave to offset an absence. (JA.9, 12).

During the trial, the district court received a stipulation that no assistant chief had ever had his pay reduced as a result of an absence from work. That is, the City's policies had never actually resulted in a reduction of pay for absences from work. In its decision reversing the

district court's imposition of liability, the Circuit Court noted the assistant chiefs disputed whether this stipulation could be considered in determining the City's liability for overtime pay. However, the Circuit Court did not rely upon the stipulation concerning the history of the assistant chiefs' pay. Instead, the Eighth Circuit found the evidentiary record which was available at the time of the summary judgment motions established that reduction of the predetermined salary was only contingent. (A.7).

The Eighth Circuit did not base its decision upon the fact that the assistant chiefs had suffered no deduction in pay. The decision was based upon the Court's view that a deduction of accumulated leave is not a deduction in pay and the potential for loss of monetary pay in the absence of accumulated leave does not, alone, make a salaried employee's pay "subject to" deduction. (A.6).

REASONS FOR DENYING THE WRIT

SUMMARY OF THE ARGUMENT

The decision of the Eighth Circuit is based upon the distinguishable facts of this case and the cases which petitioners contend present conflicting opinions and authority. The distinguishable factual bases for the decisions make review on certiorari inadvisable. Further, the decision does not create different overtime rules for public and private employers but simply recognizes the oftentimes distinct pay and leave systems in the private and public employment environs. The decision simply recognizes the principles of public accountability that restrict the pay and leave systems of public employers. It

does not leave public employees unprotected and subject to abuse, but, rather, permits an essential protection of public employees' pay to continue. In addition, the administrative regulations underlying the Eighth Circuit's decision have been changed in their application to public employers and the precedential value of any decision after review would be minimal and short-lived.

I.

THE EIGHTH CIRCUIT'S DECISION IS BASED UPON THE FACTS OF THIS CASE AND IS DISTINGUISHABLE FROM DECISIONS OF OTHER CIRCUITS. SUFFICIENT CONFLICT DOES NOT EXIST TO WARRANT REVIEW ON CERTIORARI.

The petition for certiorari is based upon differing conclusions by circuit courts. The petitioners principally rely upon the decision from the Ninth Circuit Court of Appeals in *Abshire v. County of Kern*, 908 F.2d 483 (9th Cir. 1990), cert. denied, 498 U.S. 1068 (1991), and decisions following that case. While the courts have certainly taken different approaches to construing the regulations governing the FLSA exemption for executive, administrative, and professional employees, the Eighth Circuit decision does not add to any existing conflict. The Eighth Circuit distinguished its decision in this case from the Ninth Circuit's decision in *Abshire*, supra. This case does not present any additional conflict of established law among the circuits that must be resolved.

A close reading of the Eighth Circuit's decision shows the situation the court faced was factually distinguishable from the evolving body of law represented by the *Abshire* decision. The decision here does not establish

any inflexible rule necessarily in conflict with the decisions of other circuit courts. The Eighth Circuit court said:

> Although the City's pay system is similar to that in *Abshire*, the systems are factually distinguishable. In *Abshire*, the county paid battalion chiefs overtime pay for every tenth of an hour they worked beyond their regularly scheduled work hours, and usual hourly rates for their attendance at training activities outside their work shifts. 908 F.2d at 485. This policy, alone, the Ninth Circuit observed, is inconsistent with salaried status. . . . In our view, the overtime compensation policy in *Abshire* severely limits its persuasive weight. The City does not have such an overtime compensation policy here; the chiefs are paid a predetermined amount regardless of hours worked.

999 F.2d at 296-7. The Eighth Circuit simply distinguished *Abshire* on the facts and, implicitly, its progeny, and was not persuaded the rule of *Abshire* was applicable in this case.

More specifically, the Eighth Circuit's decision distinguished the Department of Labor letter ruling relied upon by the Ninth Circuit in the *Abshire* decision. Instead of accepting the interpretation of a letter ruling that is general in scope and application, the Eighth Circuit looked to letter rulings explicitly applicable to public employees. The Eighth Circuit explained:

> The letter ruling quoted in *Abshire* and relied on by the district court states only that deductions from pay for absences of less than a day are inconsistent with section 541.118. . . . There are

> other Department of Labor, Wage, [sic] and Hour Division letter opinions that relate specifically to public employers and provide guidance.

999 F.2d at 297. Here, the question was whether a public employee's contingent, possible reduction in pay would be consistent with section 541.118. The letter rulings on which the Eighth Circuit relied suggested section 541.118 addresses only those deductions which are certain to follow from a reduction in pay due to quantity or quality of work. This refinement of the view expressed in Department of Labor letter rulings factually distinguishes this case from the line of cases based on *Abshire* and avoids the critical conflict between the circuits that might warrant Supreme Court review on certiorari.

The decision, here, does not establish a rule saying that an employer can reduce the compensation of an employee and retain the employee's exemption from overtime regulations. Nor does the decision mean, as the petitioners suggest, that an overtime claimant must establish that pay has *actually* been reduced. It merely holds that, when section 541.118 speaks of pay which is "subject to deduction", that section does not mean pay that would be deducted only if several contingencies align. Whether any particular employee's pay had ever actually been reduced due to an absence of less than a day was not a basis for the decision.

The Circuit Court did not rely upon the stipulation that the compensation of these assistant fire chiefs had never actually been reduced due to an absence of less than one day. The Court held that the evidence in the record at the time of the district court's grant of summary

judgment, i.e., the evidence without the subsequent stipulation, was sufficient to establish that the assistant chiefs were paid a predetermined amount and that reduction of that amount depended on a number of contingencies. The Court merely noted the stipulation that the chiefs had suffered no actual loss of pay as an aside. Id. at 296. Actuality of loss is a part of the decision only as a factor affecting the probability of a deduction, i.e., whether a deduction is contingent or certain. Actuality of loss is not a part of the decision as a necessary element of proof.

Petitioners incorrectly contend that the Circuit Court decision holds that the policy must actually result in diminished pay. The decision is more appropriately read as holding only that the policy must result in diminished pay as a necessary result of reduced work. Reductions for other reasons is not sufficient.

Similarly, the decisions from the 7th Circuit, 6th Circuit, and D.C. Circuit are factually distinguishable from the instant case. In *Klein v. Rush-Presbyterian-St. Luke's Medical Center*, 990 F.2d 279 (7th Cir. 1993), the Court found an actual deduction in pay had occurred because of improper suspensions that resulted in a decreased quantity of work. The Court found that the pay was actually subject to deduction, rather than contingently subject to deduction, as there had been a direct loss to the employee. Further, as in *Abshire*, the employer had treated the employee as an hourly employee and had paid the employee overtime pay. This conduct indicated the true nature of the employee's status with the employer. The combination of compensation for increased work time and the loss of pay from the

improper discipline procedure was critical to the decision. None of these factors are present in the case before this Court.

In *Mich. Assoc. of Governmental Employees v. Mich. Dept. of Corrections*, 992 F.2d 82 (6th Cir. 1993) the Sixth Circuit distinguished *Abshire* and decided the case based on factual issues rather than any general rule of law. The Sixth Circuit looked to the past practice of not reducing the employees' pay to determine, as a factual issue, what was the actual policy. The state contended that the policy the employees claimed subjected their pay to deduction was used only when absences of more than eight hours occurred. The Sixth Circuit, in dicta, speculated that it might be sufficient that the employee had "been affected" by the leave policy rather than to look for whether the employee's pay had been reduced by the policy. Id. at 86. But, the case turned upon an issue not present here. As the Court said: "In this case, the true nature of the policy is the crux of the dispute." Id. at 86. The Sixth Circuit found the actual use of the policy to be relevant in that it "may shed more light on the actual policy than an ambiguous excerpt from an employee manual. In this case, the fact that no plaintiff's pay has ever been reduced for absences of less than one day supports the defendant's interpretation of its own sick leave policy." Id. at 86. The Sixth Circuit's decision does not establish any rule in conflict with the Eighth Circuit's decision, here.

The Sixth Circuit's discussion actually sheds light on the Eighth Circuit's conclusions. The actual application of the City of Omaha's policy was relevant not to show directly whether the employees were or were not exempt from overtime requirements. Instead, the Eighth Circuit

saw the actual application of the policy as relevant evidence of the extremely contingent nature of the possible deduction permitted by the City's policy. The Eighth Circuit simply recognized that deductions in pay were unlikely and held that such an extremely contingent policy should not be the basis for changing a salaried executive into an hourly worker.

Similarly, the D.C. Circuit faced a factually distinguishable circumstance in *Kinney v. District of Columbia*, 994 F.2d 6 (1993). In that case, the fire fighters had, as in *Abshire*, been treated by the employer as hourly employees. The fire fighters had been compensated for overtime hours by the hour and were required to keep detailed timekeeping records of their overtime hours. These pertinent facts independently suggested hourly employee status quite apart from the nature of the benefits which were reduced. In addition, the D.C. Circuit refused to consider the employer's contention that the Labor Department regulations as interpreted in *Abshire* were inconsistent with the Congressional intent underlying the Fair Labor Standards Act and effectively negated the salaried employee exception for public employers. The argument was first raised on appeal and the Court would not entertain this challenge.

This Court's discretion in granting certiorari has traditionally been exercised only when essential to secure uniformity within the federal court system. Certiorari is granted only when the principles involved are important to the public and a real conflict exists between the courts of appeals. Differing results in similar cases is, alone, not sufficient to justify review on the merits. See, *McMonagle v. Northeast Women's Center, Inc.*, 493 U.S. 901 (1988)

(White, dissenting from denial of cert.). The Court has said:

> [I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeals.

Layne & Bowler Corp. v. Western Well Works, 261 U.S. 388, 393 (1923). The cases cited by petitioner in support of granting the writ of certiorari are sufficiently distinguishable on their facts; they do not present a real and embarrassing conflict of opinion and authority. The differing results in these cases do not warrant the exercise of this Court's discretionary review.

II.

THE EIGHTH CIRCUIT'S DECISION RECOGNIZES THAT THE LITERAL TERMS OF THE REGULATION'S SALARY TEST DO NOT LEAVE ROOM FOR THE PRINCIPLES OF PUBLIC ACCOUNTABILITY WHICH INHERENTLY RESTRICT A PUBLIC EMPLOYER. THE RULING DOES NOT ALLOW ABUSE OF THE EMPLOYMENT RELATIONSHIP BUT MERELY PERMITS CONTINUATION OF A LONGSTANDING PRACTICE THAT FAVORS BOTH THE EMPLOYEE AND THE PUBLIC.

The petitioners incorrectly assert that the decision of the Eighth Circuit drives a wedge between the protection available to public employees and that afforded to employees of the private sector. The petitioners warn that

the decision allows public employers to abuse their employees. The petitioners exaggerate the effect of the Eighth Circuit's ruling.

The ruling does not, by its terms, apply only to public employers or employees. The ruling simply recognizes that the principles underlying the proper analysis of the administrative regulations in this case are unique to public employers. The Eighth Circuit simply recognized that the Ninth Circuit's decision in *Abshire,* supra, and its progeny have attempted to apply rules written for private employment to a different employment environment; i.e., the public employer. However, the court's acceptance of the differing employment environments does not "drive a wedge" between the employees in these environments.

The Eighth Circuit disagreed with the Ninth Circuit's reliance on a letter ruling that is general in its terms. Instead, the Eighth Circuit concluded that Department of Labor letter opinions specifically addressing the work environment of public employers provided more guidance in ascertaining the intent of the regulations. The Circuit concluded these letter opinions "demonstrate the administrative interpretation of the regulations before us." (A.11).

The Circuit Court also recognized that "the salary basis test was promulgated long before the FLSA applied to public employees and the Ninth Circuit's strict interpretation of the salary basis test fails to consider the difference between public and private sector employees." (A.11). The FLSA was a depression-era measure intended by its drafters "to correct and as rapidly as practicable to eliminate" certain "labor conditions detrimental to the

maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202. As originally adopted, the FLSA regulated only private sector employers. See, FLSA § 3, 52 Stat. 1060. The "salary basis" test of 29 C.F.R. Part 541 was first promulgated in 1949, seventeen (17) years before Congress first applied the FLSA to any state or local employee and was written in light of the compensation practices of private sector employers. It did not attempt to consider the distinct working patterns and payment methods of government entities. The test had no reason to consider the unique responsibility of government employers to account to the electorate in some tangible fashion for the time actually spent on the public's business. (For discussion of the history of the professional, executive, and administrative employee overtime exemption in the public workplace, see, 57 Fed. Reg. 37667-37671).

The Eighth Circuit's decision reconciles this history with the traditional civil service precepts which limit the leave systems fashioned by public employers. Government is almost universally restricted from paying public funds when it has not received services in return. This restriction is based on considerations of fiscal integrity and protection of the public trust. The practice is based on sound public policy which requires that public sector pay systems be analyzed differently from private employers' pay systems. The systems have significant distinctions and serve significantly different purposes.

Because of the burden this "pay only for work" principle would place on employees who must take time away from their jobs for personal reasons, leave systems

were created to protect an employee's compensation for periods when the employee does no work. The leave systems protect the employee from a loss of monetary pay. Paid leave, instead of acting merely as another form of "pay" which can be deducted and lost to an employee absent for less than a day, is a benefit that insulates the employee from variances in the employee's pay due to absences. Leave with pay is relied upon as a protection for employees who otherwise could not be paid during an absence. Instead of causing a reduction in pay, the public sector leave programs guarantee that the employee will not suffer deductions in pay for absences from the job. The paid leave insures that the employee will continue to be paid even if there are periods of no performance. The petitioners' reasoning turns this shield into a sword.

Few public employers' compensation plans will meet the standard proposed by the petitioners. The proposed standard threatens a stable and uniform pay and benefits package. A government employer should not, as a matter of fundamental fairness, be denied an overtime exemption available to its private sector counterparts simply because the source of the government employer's funds requires a more carefully monitored and accountable approach than is typically applied to the employer who pays wages from private money.

The compensation system for public employees at issue here reflects the differences that traditionally have been found in public and private employment. When used in public employment, the system serves both the public and the public employee. But these principles of accountability need not be exclusive to the public

employer. Leave policies that act to protect the employee's continued pay may also be found in the private sector. In factually similar private sector circumstances, the principles underlying the Eighth Circuit's decision would equally apply. The decision creates no "wedge" driving apart the protections afforded to public or private sector employees.

III.

AMENDMENTS OF PERTINENT REGULATIONS ADOPTED AFTER THE GRANT OF SUMMARY JUDGMENT HAVE ALTERED THE REGULATORY FRAMEWORK AND HAVE REDUCED THE PRECEDENTIAL VALUE OF THE EIGHTH CIRCUIT'S DECISION. ANY SUPREME COURT DIRECTION GIVEN IN THIS CASE WILL, IN THE NEAR FUTURE, BE OF NO IMPORT.

The Eighth Circuit's ruling is based upon the salary-basis test expressed in the administrative regulations at 541.118. The Department of Labor, Wage & Hour Division, reacted to the line of cases developing after the *Abshire* decision by adopting new regulations addressing the very principle the City submits must be applied to public employers. Effective September 18, 1992, the Department of Labor adopted a rule which provides that public employees who otherwise qualify as salaried employees exempt from FLSA overtime requirements will not lose their exempt status solely because their pay may be reduced in accordance with a leave system like the system at issue here. 29 C.F.R. § 541.5d now provides:

> (a) An employee of a public agency who otherwise meets the requirements of § 541.118 shall not be disqualified from exemption under

> §§ 541.1, 541.2, or 541.3 on the basis that such employee is paid according to a pay system established by statute, ordinance, or regulation, or by a policy or practice established pursuant to principles of public accountability, under which the employee accrues personal leave and sick leave and which requires the public agency employee's pay to be reduced or such employee to be placed on leave without pay for absences for personal reasons or because of illness or injury of less than one workday when accrued leave is not used by an employee because –
>
> (1) permission for its use has not been sought or has been sought and denied;
>
> (2) accrued leave has been exhausted; or
>
> (3) the employee chooses to use leave without pay.
>
> (b) Deductions from the pay of an employee of a public agency for absences due to a budget-required furlough shall not disqualify the employee from being paid 'on a salary basis' except in the workweek in which the furlough occurs and for which the employee's pay is accordingly reduced.

Claims for overtime pay entitlements under the FLSA based on other than willful violations must be brought within two years of the date the claim accrued. Claims based upon willful violations must be brought within three years of the date the claim accrued. 29 U.S.C. § 255(a). Thus, public employees facing a leave system similar to that faced by the petitioners can accrue no claims for overtime as a result of the leave system after September 18, 1992, and any claims accruing before that

date will be lost by passage of time no later than September 18, 1995. The decision of the Eighth Circuit in this case, and any decision on the merits announced by this Court, will have little precedential value after the claims now accrued are adjudicated.

When exercising its appellate jurisdiction, this Court should recognize any change in law which will lessen the value of Supreme Court review. Review on writ of certiorari is a matter of judicial discretion that should be granted only when there are "special and important reasons therefor". Supreme Court Rule 10.1. This Court should avoid using its scarce judicial resources to review decisions which, with the passage of time, will quickly lose their impact on the general public.

This Court need not review this decision. The public importance of this decision will rapidly fade. Any decision on the merits would lose its significance within a short period of time after it could be announced. For this reason, alone, the judicial resources of this Court should not be wasted on reviewing this decision.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

CITY OF OMAHA,
Respondent

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